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September 17, 2008

BY HAND DELIVERY

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 6044

Dear Ms. Duncan:

Respondents Musgrove for Senate and the Democratic Senatorial Campaign Committee ("DSCC") hereby move the Federal Election Commission ("FEC" or "Commission") to dismiss MUR 6044.

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BACKGROUND

In this complaint, Wicker for Senate alleges that an advertisement financed and run by the DSCC violated the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* ("FECA" or the "Act").¹ Because the complaint's charges are completely without merit, MUR 6044 should be promptly dismissed.

The complaint alleges that the advertisement constituted coordinated public communications and should have been treated as expenditures under 2 U.S.C. § 441a(d) because it republished Musgrove campaign materials, *see* 11 C.F.R. § 109.21(c)(2). This charge is wholly without merit.

The advertisement contains all new material, created and produced by the DSCC, and therefore does not disseminate, distribute, or republish any Musgrove campaign material. Furthermore, the advertisement does not constitute a coordinated public communication under any other portion of the regulations, the statute, or court precedent: The ad was produced and aired by the

¹ The advertisement is available at <http://www.youtube.com/watch?v=yIPvivBodno>.

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DSCC to advance its legislative and policy agenda, did not contain any express advocacy, and ran outside the time windows for electioneering communications. In short, there were no violations of the Act, let alone knowing and willful violations.

ARGUMENT

I. The Advertisement Does Not Meet Any of the Content Standards for Coordinated Communications

A communication is “coordinated” with a candidate, an authorized committee, or agent thereof if it meets a three-part test: (1) payment by a third party; (2) satisfaction of one of four “content” standards; and (3) satisfaction of one of five “conduct” standards. 11 C.F.R. § 109.21; *see also id.* § 109.37(a)(2). Contrary to the complaint’s contention, the advertisement in question satisfies none of the content standards and therefore does not qualify as a coordinated communication.

A. The Advertisement Contains No Campaign Materials and Therefore Does Not Meet the Content Standard Under 11 C.F.R. § 109.21(c)(2) or § 109.37(a)(2)(i).

The complaint contends only that the advertisement satisfies the second content standard, which covers any “public communication . . . that disseminates, distributes, or republishes, in whole or part, campaign materials prepared by a candidate or the candidate’s authorized committee,” unless an exception is met. *See* 11 C.F.R. § 109.21(c)(2); *see also id.* § 109.37(a)(2)(i); *cf.* 2 U.S.C. § 441a(a)(7)(B)(iii) (“[T]he financing by any person of the dissemination, distribution, or republication, in whole or part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure.”); *accord* 11 C.F.R. § 109.23(a).

According to the complaint, the DSCC advertisement “disseminated, distributed, or republished” Musgrove campaign material. Notably, however, the complaint does not—and cannot—allege that any of the images, graphics, or audio that appeared in the advertisement were derived from Musgrove campaign materials.² Rather, the complaint simply notes that Musgrove was featured in the advertisement.

In fact, the DSCC hired its own media consultants to draft the script, shoot footage, edit the advertisement, and place it with television stations. Neither the script nor footage came from the

² Even if the advertisement contained a brief quote from Musgrove materials, this would not constitute dissemination, distribution, or republication of campaign materials. The regulations make an express exception for “a brief quote of materials that demonstrate a candidate’s position as part of a person’s expression of its own views.” 11 C.F.R. § 109.23(b)(4).

Musgrove campaign: It was all created by the DSCC. Consequently, the advertisement simply cannot constitute "dissemination, distribution or republication" of campaign materials.

Contrary to the complaint's assertion, the Commission has specifically ruled that the appearance of a candidate in a third-party advertisement is not dissemination, distribution, or republication of campaign materials. See AO 2006-29 (Bono) (holding that a television infomercial featuring an appearance by a candidate does "not disseminate, distribute, or republish, in whole or in part, campaign materials prepared by [the candidate], her authorized committee, or their agents" (citing 11 C.F.R. § 109.21(c)(2))).

Furthermore, the Commission's Advisory Opinions, Explanations and Justifications, and Matters Under Review all demonstrate that the "dissemination, distribution, and republication" of campaign materials covers the use of existing campaign material—not the creation of new materials by a third party. For example, in MUR 5743 (2006) (EMILY's List), the Commission found that EMILY's List republished campaign materials when it used photographs obtained from Betty Sutton for Congress's publicly available website. Similarly, in MUR 5672 (2006) (Save American Jobs Association), the Commission concluded that republication occurred where an organization published on its website a video that was produced and used by a campaign committee in a prior election. We are aware of no circumstance in which the Commission has suggested that the use of *new* material produced and aired by a third party constitutes republication, simply by virtue of an overlapping message or the appearance of a candidate. Cf., e.g., *Final Rules on Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 441 (Jan. 3, 2003); MUR 5743 (2006) (EMILY's List); MUR 5672 (2006); MUR 5474 (2005) (Dog Eat Dog Films, Inc.); MUR 2766 (1988) (Auto Dealers and Drivers for Free Trade).

Without reference to any Commission precedent, the complaint declares that Musgrove's appearance in the advertisement necessarily renders the ad "campaign materials." But candidates who have secured their party's nomination regularly appear in publications for parties, other candidates, and organizations. The Commission's own regulations and advisory opinions recognize that the "dissemination, republication, distribution" provision in the statute does not apply to such appearances. See AO 2006-29 (Bono); 11 C.F.R. § 109.22(g) (safe harbor for endorsements and solicitations).

In sum, because the advertisement contains no audio, video, graphics or other material from the Musgrove campaign, but rather contains new material, created and produced by the DSCC, it simply does not meet the second prong of the content standard for coordination.

B. The Advertisement Does Not Expressly Advocate the Election or Defeat of a Clearly Identified Candidate for Federal Office and Therefore Does Not Meet the Content Standard Under 11 C.F.R. § 109.21(c)(3) or § 109.37(2)(ii).

The complaint does not argue that the advertisement meets any other content standard, including the third content standard, which covers any “public communication . . . that expressly advocates the election or defeat of a clearly identified candidate for Federal office.” See 11 C.F.R. § 109.21(c)(3); see also *id.* § 109.37(2)(ii). For good reason: the advertisement is an issue ad that does not contain express advocacy.

The FEC’s regulations first define “expressly advocating” to mean any communication that uses explicit words of express advocacy such as “vote for,” “vote against,” “elect,” and “defeat.” See *id.* § 100.22(a). The advertisement in question here contains no such “magic” words and therefore does not qualify as express advocacy under § 100.22(a).

Under § 100.22(b), express advocacy also includes those communications that

[w]hen taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because –

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

Id. § 100.22(b).

However, over the course of that regulation’s history, numerous courts, commissioners, and commentators have questioned the constitutional validity of this provision. See, e.g., *Virginia Soc’y for Human Life v. FEC*, 263 F.3d 379, 391 (4th Cir. 2001) (finding § 100.22(b) unconstitutional); *Gray Davis Committee v. American Taxpayers Alliance*, 125 Cal. Rptr. 2d 534 (Ct. App. 2002) (“The [text] is too vague and reaches too broad an array of speech to be consistent with the First Amendment”); MUR 5874 (2007) (Gun Owners of America, Inc.), Mason, Statement of Reasons (“Section 100.22(b) suffers from the exact type of constitutional frailties described by the Chief Justice [in *FEC v. Wisconsin Right to Life*] because it endorses an inherently vague “rough-and-tumble of factors” approach in demarcating the line between regulated and unregulated speech. . . . With its focus on external events and what a reasonable

person might interpret speech to mean, Section 100 22(b) rests on unsustainable constitutional premises.”).

Indeed, the Fifth Circuit has expressly rejected the standard set forth in *FEC v. Furgatch*, 484 F.2d 850 (9th Cir. 1987), upon which 11 C.F.R. § 100.22(b) is based, holding that an advertisement expressly advocates only if it is “susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.” *Chamber of Commerce v. Moore*, 288 F.3d 187, 191, 193 (5th Cir. 2002). In short, under Fifth Circuit precedent a “communication must, by its express terms, exhort the viewer to take a specific electoral action for or against a particular candidate” in order to constitute express advocacy. *Moore*, 288 F.3d at 195; see also *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006).³

But even assuming § 109.22(b)’s validity, the advertisement at issue here clearly does not fall within the boundaries of “express advocacy.” Not only does the advertisement lack words such as “vote for,” “vote against,” “elect,” or “defeat”, the ad nowhere even suggests that viewers vote for or against any candidates. Rather, the advertisement’s sole call to action is for viewers to contact Congress and urge Members to support the DSCC’s policy and legislative positions. Thus, even under the Commission’s regulatory test, the ad does not contain express advocacy because it encourages the viewer to “some other kind of action” other than voting.

The advertisement’s call to action unambiguously asks viewers to call Congress and express support for the Democratic Party’s legislative and policy agenda, specifically on balanced budgets and wasteful spending. That the advertisement’s call to action is not limited to specific, pending legislation does not change the analysis: Such specificity is plainly not required under

³ There is an additional, related reason why the ad cannot be found to contain express advocacy. The Supreme Court has long held that because the right to free political expression is at the core of the First Amendment “[a] statute which upon its face . . . is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guarantee of liberty contained in the [Fifth] Amendment.” *Baggett v. Bullitt*, 377 U.S. 360, 372 n.10 (1964). As the Fifth Circuit recently emphasized, the term “express advocacy” must be interpreted to avoid vagueness problems and therefore must be clearly delineated from issue advocacy. See *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006) (observing that *McConnell v. FEC*, 540 U.S. 93 (2003), does not obviate the applicability of *Buckley*’s line-drawing between express advocacy and issue advocacy where court is confronted with a vague standard).

To deem this ad express advocacy would involve a *post hoc* determination that political speech was unlawful, without the speaker having had the benefit of a clear rule. But a standard that empowers the government to make *post hoc* judgments about the lawfulness of political speech violates the Fifth Amendment’s guarantee of due process. “Where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.” *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (notes, internal quotations and citations omitted).

Commission precedent. *See* Advisory Opinion 1995-25 (RNC); MUR 4516 (In re Democratic Senatorial Campaign Committee, et al.).

Furthermore, the fact that the advertisement depicts Musgrove and discusses his support of the Party's policy agenda, and does not criticize a Republican candidate, does not transform the advertisement into express advocacy. Courts and the FEC must focus on what the advertisement urges the viewer to do rather than on the tone of the ad. *See, e.g., Furgatch*, 807 F.2d at 864 ("[T]he pivotal question is not what the reader should prevent Jimmy Carter from doing, but what the reader should do to prevent it"). In this case, it is clear that the only "call to action" involved telephoning Congress and urging Members to support the Democratic Party's policy agenda on fiscal responsibility.

Similarly, both court precedent and the Explanation and Justification for the Commission's regulatory definition make clear that, when evaluating an advertisement, the most important consideration is its objective content, rather than the subjective intent of its sponsor. *See Federal Election Commission v. Wisconsin Right to Life (WRTL)*, 127 S.Ct. 2652 (2007); Explanation & Justification, *Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35292, 35295 (July 6, 1995). In this instance, the advertisement speaks for itself – it is an issue ad focused on policy positions.

In considering this matter, the Commission should be mindful of the Court's admonition that if any reasonable alternative reading of speech can be suggested, it cannot be express advocacy. *See Federal Election Commission v. Wisconsin Right to Life ("WRTL")*, 127 S. Ct. 2652, 2699 n.7 (2007); *see also id.* at 2659 ("the First Amendment requires us to err on the side of protecting political speech rather than suppressing it" and the Federal Election Campaign Act is unconstitutional insofar as it restricts issue advocacy).⁴ In this case the most reasonable reading is that the advertisement advanced a position on issues. Indeed, the complaint recognizes that the "advertisement focuses on federal budget and taxation issues." Compl. at 1. Critically, the Commission has repeatedly and consistently treated similar party issue advertisements as *not* containing express advocacy. *See, e.g.,* MUR 4516 (In re Democratic Senatorial Campaign Committee, et al.); MUR 4476 (In re Wyoming State Democratic Party, et al.); *see also* AO 1995-25 (RNC). The same conclusion is warranted here.

⁴ It is worth noting that the *WRTL* test does not apply to this advertisement: The *WRTL* test and 11 C.F.R. § 114.5 encompass the functional equivalent of express advocacy, while the coordination regulations and § 100.22 cover only express advocacy. Thus, the § 100.22 test is narrower. *See* MUR 5874 (Gun Owners of America), Mason, Statement of Reasons ("Express advocacy and its 'functional equivalent' cannot be identical. . . . [T]o the extent that 100.22(b) is broader or more vague than the *WRTL* [] test, it is constitutionally impermissible. If the test is identical, its application is impermissible under principles of statutory and judicial construction." (internal citations omitted)). But even if the *WRTL* standard were to apply, this advertisement would not qualify as a coordinated communication: It contains neither express advocacy nor its functional equivalent.

C. The Advertisement Does Not Meet Any of the Other Content Standards for Coordinated Public Communications.

The complaint does not argue that the advertisement meets any of the other content standards for coordinated communications—and it cannot. First, the advertisement is not and cannot be construed to be an electioneering communication under 11 C.F.R. § 100.29 and therefore does not meet the first content standard at § 100.21(c)(1).

An electioneering communication is defined as

... any broadcast, cable or satellite communication that (1) [r]efers to a clearly identified candidate for Federal office; (2) [i]s publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and (3) [i]s targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.

Id. § 100.29. In this case, the advertisement did not air within 60 days before a general election or 30 days before a primary election. Rather, it began to air on July 15, 2008, and ceased to air before August 6, 2008. The special election for United States Senate in Mississippi will be held on November 4, 2008; in accordance with Mississippi law, there was no primary.

For the same reason, the advertisement does not meet the content standard at § 109.21(c)(4) or § 109.37(a)(2)(iii). It was not aired in the candidate's jurisdiction "90 days or fewer before the clearly identified candidate's general, special, or runoff election, or primary or preference election, or nominating convention or caucus." *Id.* § 109.21(c)(4)(i); accord *id.* § 109.37(a)(2)(iii)(A).⁵

⁵ Not only does the advertisement not satisfy any of the content standards for coordinated communications, it also does not constitute coordination under 11 C.F.R. § 109.20(b)—the general coordination provision: That provision does not apply to public communications. See Explanation and Justification, *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 425 (Jan. 3, 2003); *id.* at 430 n.2; Explanation and Justification, *Bipartisan Campaign Reform Act of 2002, Reporting: Coordinated and Independent Expenditures*, 68 Fed. Reg. 430 (Jan. 3, 2003); MUR 5546 (Knowles), Mason and Von Spakovsky, Statement of Reasons; *id.*, Lenhart, Statement of Reasons.

II. Because there were no violations of established Commission Precedent, let alone knowing and willful violations, for the Commission to proceed against Respondents Here Would Be Arbitrary and Capricious and Would Violate Due Process

It is well-established precedent that once an agency adopts a final interpretation, it cannot significantly change its position without notice and comment. *See, e.g., Transportation Workers Union of America, AFL-CIO v. Transportation Security Administration*, 492 F.3d 471 (D.C. Cir. 2007); *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999); *Environmental Integrity Project v. EPA*, 425 F.3d 992, 997 (D.C. Cir. 2005); *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997); *see also CBS Corp. v. F.C.C.*, 535 F.3d 167, 175, 179-89 (3d Cir. 2008).

In this case, numerous enforcement matters involving similar issue advertisements establish a definitive agency interpretation: Advertisements like this one simply do not constitute coordinated communications. Accordingly, the agency cannot proceed against respondents, but rather must engage in notice and comment before revising its reading of the statute. *See In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000) (probable cause determinations, including statements of reasons, constitute definitive agency interpretation analogous to "formal adjudication"); *see also* MUR 5564 (Knowles), Mason and Von Spakovsky, Statement of Reasons.

To reverse course without notice would not only violate the Administrative Procedures Act, but would deprive the parties of fair notice:

Due process requires that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Although [an agency's] construction of its own regulations is entitled to "substantial deference," *Lyng v. Payne*, 476 U.S. 926, 939 (1986), we cannot defer to [its] interpretation of its rules if doing so would penalize an individual who has not received fair notice of a regulatory violation. *See United States v. Matthews*, 787 F.2d 38, 49 (2d Cir. 1986).

Upton v. S.E.C., 75 F.3d 92, 98 (2nd Cir. 1996); *see also KPMG v. SEC*, 289 F.3d 109 (D.C. Cir. 2002).

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CONCLUSION

For the foregoing reasons, MUR 6044 should be dismissed.

Very truly yours,



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and the DSCC.*

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